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| ROBERT RICHARD CSECH, |) | |
| |) | |
| Petitioner, |) | Case No. 3:05-cv-0449-ECR-RAM |
| |) | |
| vs. |) | |
| |) | |
| JOHN IGNACIO, et al., |) | ORDER |
| |) | _____ |
| |) | |
| Respondents. |) | |
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I. Procedural History

On August 16, 1996, petitioner was convicted, pursuant to guilty pleas, of lewdness with a child under the age of fourteen and sexual assault. Petitioner was sentenced to 48-120 months imprisonment for lewdness with a child under the age of fourteen. For the crime of sexual assault,

1 petitioner was sentenced to life imprisonment with the possibility of parole. (Exhibit 10).¹

2 Petitioner filed a direct appeal which was dismissed on November 14, 1996, pursuant to
3 stipulation of petitioner and the State for voluntary dismissal of the appeal. (Exhibits 15 and 16).

4 On July 31, 1997, petitioner filed a state petition for a writ of habeas corpus. (Exhibit
5 22). In his state habeas petition, petitioner claimed that: (1) trial counsel was ineffective for not
6 determining if he was competent to stand trial; (2) trial counsel was ineffective because statements were
7 obtained in violation of his *Miranda* rights; and (3) trial counsel was ineffective for failing to obtain a
8 DNA test. (Exhibit 22). On November 21, 1997, the state district court dismissed the petition. (Exhibit
9 26).

10 On January 15, 1998, the Nevada Supreme Court dismissed petitioner's appeal from the
11 denial of his state habeas petition, because petitioner did not file his notice of appeal until December 31,
12 1997, after the expiration of the thirty-day appeal period prescribed by NRS 34.575. Petitioner's notice
13 of appeal was due on December 29, 1997. Petitioner's untimely notice of appeal failed to vest
14 jurisdiction in the Nevada Supreme Court. (Exhibit 30).

15 Petitioner sought rehearing, arguing that he sent his notice of appeal on December 26,
16 1997, within the thirty-day period prescribed by NRS 34.575(1), and that his notice of appeal should be
17 deemed timely filed. (Exhibit 33). Documentation provided to the Nevada Supreme Court showed that
18 the Nevada Department of Prisons had no record regarding when petitioner delivered his notice of appeal
19 to prison officials. (Exhibit 35). On September 29, 1998, the Nevada Supreme Court denied rehearing.
20 (Exhibit 35). Remittitur issued on October 7, 1998. (Exhibit 37).

21 On December 15, 1998, petitioner mailed his federal habeas petition to this Court.
22 (Respondents' Exhibit 1; Petition filed in *Csech v. Ignacio*, CV-N-98-0742-ECR-PHA). The Court
23 denied petitioner's motion for the appointment of counsel and gave him an opportunity to supplement

24 ¹ The exhibits referenced in this Order were provided by petitioner in support of the amended
25 complaint at Docket #31, #32, and #33, as well as exhibits provided by respondents in support of the
26 motion to dismiss, at Docket #41.

1 his petition with a statement of additional claims. (Respondents' Exhibit 2; Order, filed April 30, 1999,
2 in *Csech v. Ignacio*, CV-N-98-0742-ECR-PHA).

3 Petitioner filed a motion for voluntary dismissal without prejudice. (Respondents'
4 Exhibit 4, Motion, filed May 20, 1999, in *Csech v. Ignacio*, CV-N-98-0742-ECR-PHA). Respondents
5 moved for a more definite statement. (Respondents' Exhibit 3; Motion, filed June 14, 1999, in *Csech*
6 *v. Ignacio*, CV-N-98-0742-ECR-PHA). On May 25, 1999, this Court dismissed the petition without
7 prejudice, based on petitioner's motion in which he stated his belief that additional grounds for habeas
8 relief existed that had not been presented to the Nevada Supreme Court. (Respondents' Exhibit 5;
9 Order, filed May 24, 1999, in *Csech v. Ignacio*, CV-N-98-0742-ECR-PHA). Judgment was entered on
10 May 25, 1999. (Respondents' Exhibit 6; Judgment, filed May 25, 1999, in *Csech v. Ignacio*, CV-N-98-
11 0742-ECR-PHA).

12 On January 21, 2000, petitioner filed a second state habeas petition. (Exhibit 42). On
13 February 8, 2000, the state district court denied the petition. (Exhibit 47). On October 11, 2000, the
14 Nevada Supreme Court affirmed the denial of the petition. (Exhibit 55). The Nevada Supreme Court
15 held that the petition was untimely pursuant to 34.726(1) and that it was successive pursuant to NRS
16 34.810(2). (Exhibit 55). Remittitur issued on November 7, 2000. (Exhibit 57).

17 On June 14, 2004, petitioner mailed, or handed to a correctional officer for the purpose
18 of mailing, a second federal habeas petition. (Respondents' Exhibit 7; Petition, Received June 16, 2004,
19 in *Csech v. Ignacio*, CV-N-04-0315-ECR-VPC).² By order filed July 13, 2004, the Court directed
20 petitioner to file an amended petition correcting the deficiencies of the petition, and directed petitioner
21 to include all additional claims for relief of which he was aware. (Respondents' Exhibit 8; Order, filed
22 July 13, 2004, in *Csech v. Ignacio*, CV-N-04-0315-ECR-VPC). Petitioner filed an amended petition.

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24 ² It appears that petitioner mistakenly wrote "6/14/02" as the date that he mailed the petition (see
25 item 5 of petition), and respondents have used this date throughout the instant motion. The Court deems
26 the petition mailed on June 14, 2004, because the petition was signed and dated June 14, 2004, and
received by the Court two days later, on June 16, 2004.

1 This Court ruled that the amended petition did not state any viable habeas claims, and therefore
2 dismissed the action without prejudice. (Respondents' Exhibit 9, Order, filed August 16, 2004, in *Csech*
3 *v. Ignacio*, CV-N-04-0315-ECR-VPC). Judgment was entered on August 18, 2004. (Respondents'
4 Exhibit 10; Judgment filed in *Csech v. Ignacio*, CV-N-04-0315-ECR-VPC).

5 On August 3, 2005, this Court received petitioner's third federal habeas petition. (Docket
6 #6). The verification on the petition was signed and dated July 28, 2005. (Docket #6, at p. 9). This
7 Court appointed the Office of the Federal Public Defender to represent petitioner in this action. (Docket
8 #18, Order, filed July 27, 2006). On April 13, 2007, petitioner, through appointed counsel, filed an
9 amended petition. (Docket #30).

10 The amended petition contains the following claims for habeas relief:

11 Ground One (A): Petitioner alleges that his counsel was ineffective for
12 failing to adequately investigate his competency, because petitioner had
13 told counsel that he received treatment prior to his arrest in California, yet
14 counsel did not obtain the medical records. Petitioner asserts that the
15 judge requested that the jail evaluate him in their mental health facilities.
16 Petitioner alleges that his counsel and the judge allowed him to plead
guilty without a demonstration of competence, and his counsel failed to
seek the assistance of a psychologist to investigate and prepare an
adequate defense or to assist at sentencing. Petitioner asserts that he
presented this claim to the Nevada Supreme Court in his appeal from the
denial of his post-conviction state petition.

17 Ground One (B): Petitioner claims that trial counsel was ineffective for
18 recommending that he enter into a guilty plea agreement. Petitioner
19 claims that the advice was based on a faulty and inadequate investigation
20 of the case. Petitioner claims that counsel was ineffective for failing to
21 tell him that his statement was inadmissible and that was a factor that
22 induced him to plead guilty. Petitioner claims that his counsel told him
that his statement was admissible and would be used against him at trial,
and therefore he should enter a guilty plea. Petitioner claims that the
statement was unconstitutionally obtained and that his statement would
have been suppressed had counsel effectively moved to suppress it.

23 Ground Two: Petitioner claims that his guilty plea was not knowingly,
24 intelligently, and voluntarily entered. Petitioner asserts that the reporting
25 records for transcriptions of the canvass have been destroyed. Petitioner
26 asserts that he made several comments on the record that he did not
understand the proceedings, that the trial judge became frustrated with his
inability to comprehend the plea agreement and after several instances of

1 his inability to understand the proceedings, ordered a recess. Petitioner
 2 claims that he was receiving mental health treatment and medications
 3 from the Washoe County Detention Center at the time of the entry of the
 4 plea. Petitioner asserts that he presented this claim to the Nevada
 5 Supreme Court in his appeal from the denial of his post-conviction
 6 petition.

7 Ground Three: Petitioner claims that he was denied effective assistance
 8 of appellate counsel. Petitioner claims that appellate counsel sent him a
 9 motion and stipulation to dismiss his direct appeal. Counsel included
 10 with the motion a docketing statement and correspondence stating that he
 11 felt there were no issues for appeal. Petitioner states that he signed the
 12 document, but that he understood so little about it that he signed in the
 13 plea caption. Petitioner claims that he did not understand the
 14 ramifications of his signature. Petitioner states that he could have raised
 15 the following issues: (1) trial counsel error in failing to have him
 16 mentally evaluated prior to any proceedings in district court; (2) trial
 17 court error for failure to properly canvass petitioner, allowing a plea that
 18 was not entered voluntarily, intelligently, or knowingly. Petitioner makes
 19 no statement of exhaustion with respect to Ground Three.

20 **II. Discussion**

21 **A. AEDPA Statute of Limitations**

22 Respondents move to dismiss the amended petition as untimely. The Antiterrorism and
 23 Effective Death Penalty Act (AEDPA) amended the statutes controlling federal habeas corpus practice
 24 to include a one-year statute of limitations on the filing of federal habeas corpus petitions. With respect
 25 to the statute of limitations, the habeas corpus statute provides:

26 (d)(1) A 1-year period of limitation shall apply to an application for
 a writ of habeas corpus by a person in custody pursuant to the
 judgment of a State court. The limitation period shall run from the
 latest of—

(A) the date on which the judgment became final by the
 conclusion of direct review or the expiration of the time for
 seeking such review;

(B) the date on which the impediment to filing an application
 created by State action in violation of the Constitution or
 laws of the United States is removed, if the applicant was
 prevented from filing by such State action;

(C) the date on which the constitutional right asserted was
 initially recognized by the Supreme Court, if the right has
 been newly recognized by the Supreme Court and made

1 retroactively applicable to cases on collateral review; or

2 (D) the date on which the factual predicate of the claim or
3 claims presented could have been discovered through the
exercise of due diligence.

4 (2) The time during which a properly filed application for State post-
5 conviction or other collateral review with respect to the pertinent
6 judgment or claim is pending shall not be counted toward any period
of limitations under this subsection.

7 28 U.S.C. § 2244(d).

8 Although the Ninth Circuit Court of Appeals held in 2002, that a “properly filed
9 application” was one in which the “delivery and acceptance are in compliance with the applicable laws
10 and rules governing filings” even if the petition was later held to be untimely, *Dictado v. Ducharme*, 244
11 F.3d 724, 726-27 (9th Cir. 2001), *quoting Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 364 (2000), that
12 position has since been held incorrect by the United States Supreme Court. *Pace v. DiGuglielmo*, 544
13 U.S. 408, 413 (2005). The Court in *Pace v. DiGuglielmo* held as follows,

14 In common understanding, a petition filed after a time limit, and which does not fit
15 within any exceptions to that limit, is no more “properly filed” than a petition filed
after a time limit that permits no exception.

16 * * *

17 What we intimated in *Saffold* we now hold: When a postconviction
18 petition is untimely under state law, “that [is] the end of the matter” for the
purposes of § 2244(d)(2).

19 *Id.*

20 **B. Application to the Instant Case**

21 In the present case, petitioner was convicted on August 16, 1996. Petitioner had until
22 August 16, 1997, in which to submit a federal habeas action, unless the time was otherwise tolled.

23 Petitioner filed a notice of appeal on September 4, 1996, however, he stipulated to the
24 dismissal of his appeal on November 14, 1996. Petitioner’s state habeas petition was filed on July
25
26

1 31, 1997.³ The time period from November 14, 1996, through July 30, 1997, is not tolled. 28
2 U.S.C. § 2254(d). This time period consists of 257 days.

3 The state district court dismissed petitioner's state habeas petition on November 21,
4 1997. Petitioner's notice of appeal, filed December 31, 1997, was determined by the Nevada
5 Supreme Court to be untimely. (Exhibit 30 and 35). Therefore, the time between the state district
6 court's dismissal of his state habeas petition and the time when the Nevada Supreme Court issued
7 remittitur on October 7, 1998, following the denial of rehearing, was not tolled. 28 U.S.C. §
8 2244(d)(1)(A); *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) (state post-conviction petition is not
9 "properly filed" for purposes of statutory tolling under § 2244(d)(2) if it has been rejected as
10 untimely by the state courts). This untolled time period amounts to 320 days.

11 The time period from October 7, 1998, through December 15, 1998, is not statutorily
12 tolled because petitioner had no state post-conviction action pending. 28 U.S.C. § 2244(d)(2). That
13 time amounts to 38 days.

14 Petitioner submitted a federal habeas petition on December 15, 1998. The action was
15 dismissed on May 24, 1999. Judgment was entered on May 25, 1999. The time that petitioner was
16 pursuing his federal habeas petition was not tolled. *Duncan v. Walker*, 533 U.S. 167 (2001). That
17 time amounts to 162 days.

18 The time from May 25, 1999, to January 21, 2000, is not tolled, because petitioner
19 had no state post-conviction action pending. 28 U.S.C. § 2244(d)(2). That time amounts to 241
20 days.

21 On January 21, 2000, petitioner filed a second state habeas petition. The petition was

22 ³ In his opposition papers, petitioner contends that pursuant to the mailbox rule, the state petition
23 must be deemed filed on July 28, 1997, the day it was mailed, citing *Huzar v. Carey*, 273 F.3d 1220,
24 1223 (9th Cir. 2001) (mailbox rule applies to state habeas petitions under the tolling provisions of
25 AEDPA). Respondents assert that the Nevada Supreme Court has held that the mailbox rule does not
26 apply to the filing of state habeas petitions. *Gonzales v. State*, 118 Nev. 590, 593-96 (2002). Assuming
arguendo, that the mailbox rule applies and that the state habeas petition was filed on July 28, 1997, the
difference of three days is not determinative of the resolution of the instant motion.

1 denied, and on October 11, 2000, the Nevada Supreme Court found the petition untimely pursuant to
2 NRS 34.726(1). On November 7, 2000, remittitur issued. The time during which petitioner was
3 pursuing his second state habeas petition is not tolled. 28 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*,
4 544 U.S. 408, 413 (2005) (state post-conviction petition is not “properly filed” for purposes of
5 statutory tolling under § 2244(d)(2) if it has been rejected as untimely by the state courts). That
6 untolled time period amounts to 290 days.

7 Following the issuance of remittitur by the Nevada Supreme Court on November 7,
8 2000, and the commencement of his second federal habeas action on June 14, 2004, petitioner had
9 no properly filed state post-conviction action pending in state court, therefore, the time is not tolled.
10 28 U.S.C. § 2244(d)(2). The untolled time amounts to 1,312 days.

11 On June 14, 2004, petitioner commenced his second federal habeas action. The
12 action was dismissed and judgment was filed on August 18, 2004. The time between June 14, 2004,
13 and August 18, 2004, while petitioner was pursuing his second federal habeas action is not tolled.
14 *Duncan v. Walker*, 533 U.S. 167 (2001). That time amounts to 66 days.

15 Following the dismissal of his second federal habeas action on August 18, 2004,
16 petitioner had no properly filed state post-conviction action pending. The time from the dismissal of
17 the second federal habeas action on August 18, 2004, until the commencement of the instant federal
18 habeas action on July 28, 2005, was not tolled. That time amounts to 344 days.

19 The total time that went untolled is 3,030 days, which is over 8 years. The instant
20 federal habeas petition is woefully untimely pursuant to the one-year AEDPA statute of limitations.
21 28 U.S.C. § 2244(d).

22 **C. Petitioner is Not Entitled to Equitable Tolling**

23 The AEDPA one-year limitations period is subject to equitable tolling. *See Calderon*
24 *v. United States District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on*
25 *other grounds, Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998).

1 Equitable tolling is available only “if extraordinary circumstances beyond a prisoner’s control make
2 it impossible to file a petition on time.” *Beeler*, 128 F.3d at 1288. Generally, a litigant seeking
3 equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his
4 rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v.*
5 *DiGuglielmo*, 544 U.S. 408, 418 (2005).

6 Petitioner contends that he is entitled to equitable tolling “based on his personal
7 circumstances and failure of counsel to explain the process or take an appeal on his behalf, as he is
8 mentally impaired to the extent that he was unable to file his petition in a timely manner and he was
9 not properly advised of his appeal rights.” (Petitioner’s Opposition, Docket #45, at pp. 8-9). There
10 are no factual findings in the record to support petitioner’s alleged “personal circumstances,” his
11 alleged mental impairment, or his attorney’s alleged failure to inform him of his right to appeal.
12 Petitioner has not explained what his “personal circumstances” were, and he has not specified the
13 nature of his alleged mental impairment. Petitioner has not provided this Court with an explanation
14 of why or how these factors caused and should excuse his 8-year delay in filing the instant federal
15 habeas petition. Petitioner has not demonstrated diligent pursuit of his rights and extraordinary
16 circumstances beyond his control made it impossible to file his federal habeas petition on time.
17 Petitioner’s current petition was filed over 7 years late without valid justification for the delay and
18 will therefore be dismissed pursuant to 28 U.S.C. § 2244(d).

19 **III. Certificate of Appealability**

20 The Court has considered the issues raised by petitioner, with respect to whether they
21 satisfy the standard for issuance of a certificate of appealability. In order to proceed with an appeal,
22 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th
23 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v.*
24 *Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial
25 showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C.
26

1 § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate
2 that reasonable jurists would find the district court's assessment of the constitutional claims
3 debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry,
4 the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason;
5 that a court could resolve the issues differently; or that the questions are adequate to deserve
6 encouragement to proceed further. *Id.*

7 Where the court has dismissed a petitioner's habeas corpus petition on procedural
8 grounds, however, the determination whether a certificate of appealability (“COA”) issue becomes a
9 two-part test. The Supreme Court has held that under such circumstances:

10 When the district court denies a habeas petition on procedural grounds without
11 reaching the prisoner's underlying constitutional claim, a COA should issue when the
12 prisoner shows, at least, that jurists of reason would find it debatable whether the
13 petition states a valid claim of the denial of a constitutional right and that jurists of
14 reason would find it debatable whether the district court was correct in its procedural
15 ruling.

16 *Slack*, 529 U.S. at 484. Therefore, in order to obtain a COA in cases dismissed on procedural
17 grounds, petitioner has the burden of demonstrating both that he was denied a valid constitutional
18 right, *and* that jurists of reason would find it debatable whether the court's procedural ruling was
19 correct. In cases where there is a plain procedural bar to a petitioner's claims and the district court is
20 correct to invoke that procedural bar to dispose of the case, “a reasonable jurist could not conclude
21 either that the district court erred in dismissing the petition or that the petitioner should be allowed to
22 proceed further.” *Id.* Under those circumstances “no appeal would be warranted.” *Id.* Furthermore,
23 the court may resolve either issue first when the answer to one issue is more apparent from the record
24 and arguments. *Id.* at 485; *see Petrocelli v. Angelone*, 248 F.3d 877, 884 (9th Cir. 2001).

25 In the present case, petitioner's habeas petition is being dismissed because it was
26 untimely filed. The Court did not reach the merits of any of petitioner's constitutional claims.
Petitioner's habeas petition was filed over 7 years late and petitioner failed to demonstrate that he is

1 entitled to equitable tolling of the statute of limitations in this case. No reasonable jurist could
2 conclude that this Court's procedural ruling was in error. Petitioner is not entitled to proceed further,
3 and is not entitled to a Certificate of Appealability.

4 **IV. Conclusion**

5 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (Docket #40)
6 is **GRANTED** and the amended petition is **DISMISSED** with prejudice as untimely. The Clerk
7 shall enter judgment accordingly.

8 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of
9 appealability.

10 DATED this 22nd day of February, 2008.

11 
12 UNITED STATES DISTRICT JUDGE